INTERNATIONAL AGREEMENTS

WITHOUT THE ADVICE AND CONSENT OF THE SENATE.

BY

James F. Barnett

REVISED AND REPRINTED WITH ADDITIONS FROM THE YALE LAW JOURNAL.

Grand Rapids, Michigan
1906

BD Aug. 1917

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International Agreements without the Advice and Consent of the Senate.

The Constitution of the United States [1] provides that the President "shall have power by, and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Judge Story, in his work on the Constitution, in commenting on this passage, says: "The power to make treaties is by the Constitution general, and, of course, it embraces all sorts of treaties for peace or war; for commerce or territory; for alliance or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law, and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other."[2]

From this it might be supposed that an agreement with a foreign state, to which the approbation of the Senate has not been given, is a thing unknown to our constitutional practice. This is, however, not the fact, and it will be the purpose of this article to point out that there are certain classes of international agreements, in the making of which the Senate does not have a share.

The Constitution itself recognizes certain international agreements which are not treaties. While the States are forbidden to enter into "any treaty, alliance or confederation," they may, with the consent of Congress, make agreements and compacts with each other or with foreign powers.[3] The discussion therefore resolves itself into two parts, the first of which is,

I.

AGREEMENTS BY THE STATES.

The Articles of Confederation forbade the States, without the consent of Congress, to "enter into any conference, agreement, alliance or treaty with any king, prince or state," or, without the same assent, "to enter into any treaty, confederation or alliance" with each

1. Constitution Art. II, Sec. 2.
2. Commentaries on the Constitution § 1508.
3. Constitution, Art. I, Sec. 10, cl. 1 and 3.

other.[4] The omission of "agreement" from the second list was apparently construed by certain States to permit agreements between members of the Confederation. Thus, Virginia and North Carolina, in 1779, and Pennsylvania and Virginia in 1784, made agreements with reference to their common boundaries. In 1783, Pennsylvania and New Jersey came to an agreement as to the jurisdiction of the two States over the river Delaware and its islands. New York and Massachusetts, in 1786 made an agreement for the surrender by the latter of its land claims in Western New York.[5] In 1785, Maryland and Virginia entered into a compact respecting navigation and jurisdiction in Chesapeake bay, Pocomoke sound and the Potomac river, and also as to port regulations and fisheries in these waters. It was expressly held by the Supreme Court, in *Wharton v. Wise,* that the last mentioned agreement was not a "treaty, alliance or confederation" within the meaning of Article VI, paragraph 2 of the Articles of Confederation.[6] It should also be noted that the Articles of Confederation provided that "differences between two or more States concerning boundaries, jurisdiction, or *any other cause whatever,*" might, on petition to Congress by one of the parties, be referred for settlement to a commission to be established under the direction of Congress, and that the decision thereof should be final.[7] Reference to Congress was, therefore, optional, and the provision manifestly contemplated an attempted settlement by the States involved before appeal was made to Congress.

The practice in this matter under the Confederation[8] evidently lead the framers of the Constitution to prohibit agreements or compacts, except with the consent of Congress. Since the adoption of the Constitution, numerous agreements or compacts, relating principally to boundaries, have been made between States, but all, so far as known, with congressional assent.

Judge Story, writing in 1833, considered that the precise distinction between the words, "treaty," "agreement," and "compact" was not clear. He seemed inclined, however, to assign to the first term

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4. Articles of Confederation, Art. VI, Secs. 1 and 2.

5. Gannett, Boundaries of the United States, 97, 86, 83, 84, 69. ***Poole v. Fleeger,*** 11, Pet. 185.

6. *Wharton v. Wise,* 153 U. S., 163.

7. Articles of Confederation, Art. IX, Sec. 2.

8. Madison in his "Notes on Proceeding of the Federal Convention," referred to the above agreements between Virginia and Maryland and Pennsylvania and New Jersey as "compacts without previous application or subsequent apology." Doc. Hist. of the Const., III, 155.

engagements of a political character. The other two, he thought, might apply to "what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land, situated in the territory of each other, and other internal regulations for the mutual comfort and convenience of states, bordering on each other."[9]

The meaning of the words "treaty," "agreement" and "compact," as applied in international relations was discussed by Chief Justice Taney in the case of *Holmes v. Jennison,* in the year 1840.[10] The question here involved was the right of a State (Vermont) to surrender a fugitive from justice, on the request of a foreign government (Lower Canada), and it was there held that the surrender might not lawfully be made, because it necessarily involved an agreement between a State and a foreign power, to which the assent of Congress had not been given. In considering the meaning of the words "treaty," "agreement" and "compact" as used in Article I, Section 10 of the Constitution, Chief Justice Taney observed that "the words 'agreement' and 'compact' cannot be construed as synonymous with one another, and still less can either of them be held to mean the same thing with the word 'treaty,' in the preceding clause." . . . "Undoubtedly in the sense in which the word is generally used, there is no treaty between Vermont and Canada. For when we speak of a 'treaty' we mean an instrument written and executed with the formalities customary among nations; and as no clause in the Constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the State of Vermont." He then quotes the definition of these words as given by Vattal who says:

"A treaty, in Latin, *foedus,* is a compact made with a view to the public welfare, by the superior power, either for perpetuity or for a considerable time."

"The compacts which have temporary matters for their object, are called agreements, conventions and pactions. They are accomplished by one single act and not by repeated acts. These compacts

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9. Story on the Constitution §§ 1402, 1403.

10. *Holmes v. Jennison,* 14 Pet. 540.

11. Ibid, 571, 572, 573, and Vattel, Law of Nations, II, §§ 152, 153.

For the reliance placed by our early statesmen and farmers of the Constitution on Vattel, see Wharton's Diplomatic Correspondence of the Revolution, II, 64; Documentary History of the Constitution, III, 225; Madison's Letters and other writings, Vols. I, 124, 614, 634, 651; II, 249; IV, 446.

are perfected in their execution once for all; treaties receive a successive execution whose duration equals that of the treaty.[11]

It is true that Vattel's definition of agreements, quoted by Judge Taney, speaks of them as "accomplished by one single act and not by a series of acts . . . perfected in their execution once for all." Vattel says elsewhere,[12] of agreements of this kind:

"The treaties which have no relation to the performance of reiterated acts, but merely relate to transient and single acts which are concluded at once;—those treaties (unless it is more proper to call them by another name*)—those conventions, those compacts which are accomplished once for all, and not by successive acts — are no sooner executed than they are completed and perfected. If they are valid, they have in their own nature a perpetual and irrevocable effect."

The reference is to the so-called "transitory conventions,"—"transitory," because by their nature they are at once executed and leave nothing more to be done. Such, according to Wheaton, are treaties of cession, boundary or exchange of territory, which are not abrogated like other treaties on the breaking out of war between the contracting parties.[13] Nevertheless, it may be doubted whether the framers of the Constitution used the words agreement and compact, either in the restricted or extended sense. They had in mind the various compacts which the States, under the Confederation, had made with each other, and they intended, apparently, to provide that if the States made agreements in the future, it must be with the assent of Congress. The language of the constitutional provision is that "no State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power." (I 10, 3). There is no distinction here between agreements, domestic or foreign, and the rule of construction, *noscitur a sociis,* would raise the presumption of a similar meaning and limitation for both.[14] The case of *Holmes v. Jennison*

"* See Chap. XII, § 153."

12. Vattel, Law of Nations II, ch. 12, § 192.

13. Wheaton's International Law, pt. III, ch. 2, §§ 9, 10.

14. Mr. Justice Field in *Virginia v. Tennessee,* referring to agreements and compacts between the States said, that the prohibition "is directed to the formation of any combination tending to increase the political power of the States which may encroach upon, or interfere with, the just supremacy of the United States." In delivering the opinion of the Court in *Stearns v. Minnesota,* Mr. Justice Brewer pointed out that a distinction exists between agreements between the States which relate merely to property rights, and agreements which have a political object, the former being permissible, the latter not. 148 U. S. at p. 519. 179 U. S. at p. 244.

is, however, authority for the proposition that extradition by a State at the request of a foreign government, necessarily involves an agreement which is one of those forbidden to the States to enter into except with the consent of Congress. It also declares, *obiter*, that such an agreement is not a treaty.

It is believed that the only instance of agreements between a State of the Union and a foreign power were those growing out of the interests of Maine and Massachusetts in the northeastern boundary dispute with Great Britain, and relating more particularly to the so-called Aroostook War in 1839. Peace was maintained for a decade prior to this date by an understanding between the American and British governments to the effect that each side should refrain, during the progress of the negotiations, from any extension of the exercise of jurisdiction in the disputed territory.[16] Although certain acts of the State and Provincial governments, and of their citizens, gave rise to local friction and to remonstrances from the diplomatic representations of both nations, peace was not seriously endangered until the date referred to. One of the principal causes of irritation was the alleged illegal cutting of timber on the frontier. By an exchange of notes between the State Department and the British Legation at Washington, Mar. 7, Mar. 11, 1829, and Feb. 28, Mar. 4, 1834, a further understanding was reached that if any timber should be brought into the acknowledged boundaries of New Brunswick from the disputed territory, the proceeds of the sale of it should be held for the benefit of the party to whom the territory might be ultimately awarded.[17]

The renewal of timber cutting by British subjects in the Aroostook Valley at the close of 1838, and the arrest of the land agent of the State of Maine, sent thither at the head of a civil posse, to stop these acts of trespass, were the occasion of the Aroostook War. Armed forces were dispatched to the disputed territory by the order of the executives of Maine and New Brunswick.[18]

This threatening state of affairs caused Mr. Forsyth, Secretary of State, and Mr. Fox, the British Minister, to sign on Feb. 27,

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16 Messages and Papers of the Presidents, III, 368, 526.

This was the understanding of the United States government of the agreement. The British government interpreted the agreement as meaning that the disputed territory should remain exclusively under British jurisdiction until final settlement of the boundary question.

American State Papers, Foreign Relations, VI, 942.

17. Messages and Papers of Presidents, III, pp. 413, 414, 428.

18. Ibid p. 517.

1839, a "memorandum" in which they agreed upon the line of conduct which they would recommend to the governments of Maine and New Brunswick, pending the definitive settlement of the question by the American and British governments. This "memorandum" stipulated accordingly, that while the government of Maine and her officers would not seek to expel by military force the armed force of Maine, the latter would be withdrawn beyond the bounds of the disputed territory, and that the dispersing of tresspassers and the protecting of public property should be conducted in concert, jointly or separately, "according to agreement between the governments of Maine and New Brunswick." [19]

On the day following the signing of the "memorandum" General Winfield Scott was instructed by the Secretary of War to proceed to the State of Maine and place himself in communication with the Governor of the State, and to urge him to accept the "informal agreement entered into between the Secretary of State and the British Minister." Scott found that the terms of the memorandum were unsatisfactory to the people of Maine, who regarded it as an unequal compact. Scott's personal friendship with the Governor of New Brunswick enabled him to open a correspondence with that official, looking to a settlement of the difficulty. And it is probable that there was an informal understanding with the President, before Scott left Washington, that this would be the line of action taken. But he acted throughout in consultation with the Governor of Maine.

The mediation of General Scott resulted in an agreement between Maine and New Brunswick which differed, however, in its terms from the "memorandum." The important portions of the correspondence, which evidenced the agreement, were as follows: On Mar. 21, 1839, General Scott invited from Sir John Harvey, the Governor of New Brunswick, a general declaration,

"That it is not the intention of the Lieutenant Governor of Her Britannic Majesty's Province of New Brunswick, under the expected renewal of negotiations between the cabinets of London and Washington on the subject of the said disputed territory, without renewed instructions to that effect from his government, to seek to take military possession of that territory, or to seek, by military force, to expel therefrom the armed civil posse or the troops of Maine.

"Should the undersigned have the honor to be favored with such declaration or assurance, to be by him communicated to his Excellency the Governor of the State of Maine, the undersigned does not in the least doubt that he would be immediately and fully authorized by the Governor of Maine to communicate to his Excellency, the Lieutenant Governor of New Brunswick, a corresponding pacific declaration to this effect:

19. Ibid, p. 526.

"That, in the hope of a speedy and satisfactory settlement, by negotiation, between the Governments of the United States and Great Britain, of the principal or boundary question between the State of Maine and the Province of New Brunswick, it is not the intention of the Governor of Maine, without renewed instructions from the Legislature of the State, to attempt to disturb by arms the said Province in the possession of the Madawaska settlements, or to attempt to interrupt the usual communications between that Province and Her Majesty's Upper Provinces; and that he is willing, in the meantime, to leave the questions of possession and jurisdiction as they at present stand—that is, Great Britain holding, in fact, possession of a part of the said territory, and the Government of Maine denying her right to such possession; and the State of Maine holding in fact, possession of another portion of the same territory, to which her right is denied by Great Britain.

"With this understanding, the Governor of Maine will, without unnecessary delay, withdraw the military force of the State from the said disputed territory—leaving only, under a land agent, a small civil posse, armed or unarmed, to protect the timber recently cut, and to prevent future depredations.

"Reciprocal assurances of the foregoing friendly character having been, through the undersigned, interchanged, all danger of collision between the immediate parties to the controversy will be at once removed, and time allowed the United States and Great Britain to settle amicably the great question of limits."

The formal acceptance of these terms, by letters from the two Governors, addressed to General Scott on Mar. 23 and Mar. 25, completed the arrangement. [20]

This agreement was a true *modus vivendi,* a form of agreement which will be examined more at length in subsequent pages. [21] It was expressly, stated to be made "in the hope of a speedy and satisfactory settlement by negotiation, between the Governments of the United States and Great Britain, of the principal and boundary question." In this case, though negotiated by a representative of the Federal government, the agreement was in legal effect the act of a State, and a foreign province.

Article V of the Webster-Ashburton treaty recognized the agreement, referred to above, with respect to the payment into the treasury of New Brunswick, of the proceeds of the sale of timber cut in the disputed territory and brought into that province. It provided that,

"Whereas, in the course of the controversy respecting the disputed territory on the northeastern boundary, some moneys have been received by the authorities of Her Britanic Majesty's Province of New Brunswick, with the intention of preventing depredations on the forests of the said territory, which moneys were to be carried to a fund called the 'disputed Territory Fund,' the proceeds whereof it was agreed should be hereafter paid over to the par-

20. H. doc. 169, 26 Cong. 1 Ses., Vol. 4, pp. 2, 7, 8, 13.
Memoirs of General Scott, II, 334-351.

21. Post p. 31.

ties interested in the proportions to be determined by a final settlement of boundaries: It is hereby agreed that a correct account of all receipts and payments on the said fund shall be delivered to the government of the United States within six months after the ratification of this treaty, and the proportion of the amount due thereon to the States of Maine and Massachusetts, and any bonds or securities appertaining thereto shall be paid and delivered over to the government of the United States, and the government of the United States agrees to receive for the use of, and pay over to the States of Maine and Massachusetts their respective portions of said fund."

We learn from notes exchanged between Mr. Pakenham, British minister in Washington, and Mr. Buchanan, Secretary of State, on March 17 and April 21, 1847, respectively, that agents of Maine and Massachusetts, properly accredited to the Governor of New Brunswick by letters from Mr. Pakenham and Mr. Buchanan, proceeded to New Brunswick and there effected a settlement of the disputed territory fund account with commissioners appointed by the provincial government. The result was a " deed of agreement and settlement concluded between the agents and commissioners on both sides, and the money found to be due to the States of Maine and Massachusetts, and the bonds and securities appertaining thereto were paid over and delivered to the agents of those States."

The agents of the two States had the duty, according to the terms of the article above quoted, to agree upon " the proceeds to be paid the parties interested in the proportions" determined by the final settlement of the boundary line. This must have been principally a mathematical calculation. The resulting agreements would certainly be among those described by Vattel as " compacts perfected in their execution once for all" and "accomplished by a single act." But they were evidently not thought by Mr. Buchanan and President Polk to require the assent of Congress.

It can hardly be said that the assent of the Senate to the Webster-Ashburton treaty, by recognizing the claims of Maine and Massachusetts, gave legal validity to the proceeding. The provisions of Article V of the treaty contemplated that the claims should be adjusted by the government of the United States acting in behalf of the two States. Practical considerations, however, made it preferable that the real parties in interest should settle the account. The object of the above correspondence between Mr. Buchanan and Mr. Pakenham was, therefore, to establish the fact that the British government was discharged of all obligations in the matter, and Mr. Buchanan replied that the "United States government so regarded it." [22]

22. Ex. Doc. 63, 37 Cong. 2 sess. Vol. 5.

An instance of quasi-diplomatic negotiations between a State of the Union and a foreign power, not resulting in an agreement, occurred in the year 1850. For some twenty years prior to that date, a law on the statute books of South Carolina had forbidden the entrance of free colored persons into the State, and provided that any such persons employed on board of a vessel, coming from any other State or foreign country, should be imprisoned during the stay of the vessel in port. This law was passed originally in 1822 in consequence of an attempted servile insurrection, organized, it was said, by a free colored man employed on a vessel visiting Charleston. The enforcement of the law against a British subject in the year 1823, caused a protest from the British minister at Washington to the State Department. Mr. Wirt, the Attorney General, having rendered an opinion that the law of South Carolina was unconstitutional, as in controvention of the power of Congress to regulate inter-state and foreign commerce, a copy of this opinion, together with the correspondence with the British minister, was on July 6, 1824, by direction of the President, transmitted to the Governor of South Carolina, and the hope expressed that "the inconvenience complained of would (will) be remedied by the Legislature of the State." In reply one branch of the Legislature passed a resolution asserting the constitutional right of the State to "guard against insurrection among its colored population."

Another arrest of a British negro subject at Charleston in 1830 evoked a like protest from the British government. The matter was referred to the Attorney General, Mr. Berrien, who, however, gave an opinion opposed to that of Mr. Wirt, and declared that the law of South Carolina was one relating to internal police and was therefore a proper exercise of a power reserved by the Constitution to the States.

In the year 1850, Great Britain, having failed to obtain redress through the Federal government,[23] resolved to deal directly with the government of South Carolina, and on Dec. 17th of that year, Mr. Mathews, the British consul at Charleston, under instructions from his government, addressed a note to the Governor of South Carolina,

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23. According to the London *Morning Chronicle* of Feb. 20, 1851, the English government first applied to Mr. Clayton, then Secretary of State, who replied with "a not very lucid or satisfactory legal argument" admitting that the right exercised by South Carolina had not been ceded to the Federal Government. President Fillmore and Mr. Webster reversed the position taken by their predecessors, and Sir Henry Bulwer became engaged in a "long and active

in which he invited the attention of the Governor and the Legislature of the State, to the hardship suffered by British subjects, in consequence of the law, and expressed the hope that its objectionable features would be removed. The Governor transmitted to the Legislature for its consideration, a copy of the note, but that body still refused to change the law and adopted resolutions in justification of it. In the course of a report from Mr. Edward McCrady, chairman of the special committee of the House of Representatives of South Carolina, named to consider the question, occurs the following passage, which is quoted because of its bearing on the subject of agreements made by the States:

"If a law obnoxious to a foreign nation in amity with the United States, be within the reach of the treaty-working power, the Executive Department of the Federal Government is the depository of that power, and should be involved, as it alone is the proper organ for response. But where such law is beyond the reach of the treaty-making power and within the exclusive control of a particular State, then the foreign power may apply directly to the State itself, which, "with the consent of Congress," may under the express provision of the Constitution of the United States, "enter into agreements or compacts" on the subject with such foreign power. The consent of Congress is not required to authorize *negotiation* in such case. Negotiation must precede agreement or compact and may result in nothing; but if it lead the foreign power and the State to terms of compact mutually acceptable, then that compact, upon these terms must be submitted to Congress and by Congress assented to, and made binding and complete, or if disapproved, made null and void."

Having failed in his attempted negotiations with the government of the State, the British consul turned to the courts in order to make a test of the constitutionality of the law. An action for trespass, assault and false imprisonment was begun in the United States Court at Charleston, in June, 1852, against the sheriff, by one, Roberts, a negro imprisoned under the law. The validity of the act was sustained and an appeal taken to the Supreme Court of the United States. The appeal was shortly afterwards abandoned, evidently in consequence of a statement contained in the Governor's message of Nov. 23, 1852, to the effect that, had it not been for these legal proceedings, which

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correspondence" explaining the British consul's "diplomatic irregularity." Living Age, Vol. 29, 42.

The expulsion from South Carolina of Mr. Hoar, the agent of Massachusetts, sent thither in 1844 to investigate cases of Massachusetts negroes affected by the law, the inconclusive debates in Congress in 1845, in connection with the admission of Florida, when the same question was raised, and the contemporary disunion sentiment, probably induced the Taylor administration to take this stand.

Niles Register, 67, 315 ff; Congressional Globe, Vol. 14.

Benton, Thirty Years' View, II, 740.

were construed as "an attempt to bring us into conflict with the General Government," he should have recommended a modification of the law. By the act of Dec. 28, 1856, the law was at last amended and free negroes in such cases were thereafter exempt from arrest, so long as they remained on board the vessel, the master being required to give a bond to the local authorities, conditioned on the fulfillment of this requirement. [24]

The opinion has been expressed that it is beyond the competence of a State of the Union, and a bordering province of Canada to enter into an agreement; for example, to regulate fisheries in their contiguous waters. [25] With all deference to the learned authority, it seems that such an agreement would be lawful if sanctioned by Congress. It would, of course, be preferable that the whole matter of fishery in the bordering great lakes and rivers should be regulated by treaty made with Great Britain in behalf of the Dominion of Canada, if the Constitution permits. In the absence of formal treaty, there is certainly no legal obstacle to an agreement of this kind.

The Supreme Court of the United States has said that the Constitution contains no grant to the Federal government of a power to regulate fisheries in the several States. [26] It must therefore be one of those powers, which by the tenth Amendment are expressly reserved to the States. As Prof. Burgess has observed. "It (the treaty-making power) is certainly limited by the general principle of the Constitution, i. e. by the constitutional distribution of the powers of government between the general government and the commonwealths. The treaty-making power cannot deal with any subject reserved by the Constitution to the exclusive jurisdiction of the commonwealth." [27]

24. Niles Register, Vol. 27, 261. House Reports, No. 80, 27 Cong., 3 ses., Vol. I. Acts of the General Assembly of South Carolina, 1850. Reports and Resolutions, pp. 242-244; Ibid, 1851, (Journal of Senate), p. 96, (Reports and Resolutions), p. 106; Ibid, 1852, (Journal of H. of Rep.), pp. 23-25; Ibid, 1853, (Journal of H. of Rep.), p. 29. *Roberts v. Yates,* 20 Fed. Cases, 371. Acts of General Assembly South Carolina, 1856, p. 573.

For discussion of question in British Parliament in 1853, Hansard Parliamentary Debates, 3d ser., Vol. 128, pp. 131, 136, 1088.

25. Butler's Treaty Making Power, I, § 123.

Although the British North American Act of 1867 vested in the Dominion Parliament exclusive legislative powers in respect to "Sea coast and inland fisheries," (Sec. 91), it appears to be modified as to the Province of Ontario by subsequent act of the Imperial Parliament (48 V. ct. 9, S. 2), which gave to the Legislature of Ontario rights of legislation in respect to fisheries in that province. Revised Statutes of Ontario (1887) 1:337.

26. *McCready v. Virginia,* 94 U. S., 391. *Lawton v. Steele,* 152 U. S., 133.

27. Political Science Quarterly, Vol. 6, p. 343.

Mr. Butler, on the other hand, is of a contrary opinion and thinks that under Article VI of the Constitution (making treaties the supreme law of the land) the Federal government may, "go much further in regulating matters within the jurisdiction of the States than the legislative department of the government can go." [28]

In Manchester v. Massachusetts, [29] Mr. Justice Blatchford said that the State of Massachusetts necessarily had control of her fisheries in the absence of congressional legislation assuming control for the national government. But he said that as to the right of the Federal government to assume control, he expressed no opinion. Whichever view is correct, the power to protect fisheries in the States resides at present in their respective governments. Pending the settlement of the constitutional question by the Supreme Court, the bordering States of the Union may find it necessary to act in their own behalf by way of fisheries agreements with the Dominion or provincial governments.

This would seem very plainly to be the sort of agreement contemplated by the constitutional provision here discussed. The mere subject-matter of the agreement would not make it a treaty as the word is used in the Constitution. The States may make with each other boundary adjustments and cessions of territory, but these are not treaties. Neither would it be a treaty because made with a foreign colony, for the Constitution expressly provides for agreements with a foreign power. One is forced either to adopt this conclusion or to admit that, under our Constitution, the treaty-making power is divided, and that engagements with foreign states, which are political in character and interest the States as a whole, are made by the President, ordinarily with the concurrence of the Senate, and that those, which are merely local and non-political, may be made by the States with the consent of Congress. In any event, the arrangement becomes a national act by receiving congressional sanction and thus avoids the danger of particularism. [30]

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28. Butler op. cit. II pg. 321, citing 8 Opp. Atty. Gen. 411.

29. 139 U. S., 240.

30. Constitution Art. I, Sec. 10, cl. 3, provides: "No State shall without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, etc." Congress has on several occasions passed acts validating previous State laws imposing duties of tonnage. These powers are reserved in the same clause and made subject to the same limitation. They must therefore be construed alike. An act of the State of Maryland relating to tonnage dues was continued in force by assent, successively given by Congress,

In other federal systems (for example, Germany and Switzerland) the component states have a limited right of making treaties with each other and with foreign states. In Germany they also have the right of sending and receiving diplomatic agents.[31] A fundamental law of the Empire permits postal and telegraph treaties between the individual states and their immediate foreign neighbors.[32] Actual practice has, however, been much broader. The individual states have made treaties with their immediate foreign neighbors relating to fishery and navigation in the Rhine and Lake Constance; also as to boundaries, railroads, extradition, medical inspection of travelers, and exchange of census reports.[33] In only one instance, that of the boundary convention of April 28, 1878, between Baden and Switzerland, does there seem to have been a confirmation by the Imperial government of these arrangements. In this case the convention of June 24, 1879, with Switzerland, recognized the preceding one as having ~~legal~~ validity for the German Empire.[34]

The Swiss constitution gives to the Confederation the sole right of "concluding alliances and treaties with foreign powers," but "by exception the Cantons preserve the right of concluding treatises with foreign powers, respecting the administration of public property, and border and police intercourse; but such treaties shall contain nothing contrary to the Confederation or to the rights of other Cantons." Treaties made by the Cantons are to be brought before the Federal Assembly (Parliament) for approval, only in case the Federal Council (the executive) or another Canton protests. Thus a Cantonal treaty with a foreign power may go into operation and become a binding contract, without the government of the Confederation participating in the arrangement. The Constitution provides, also, that while "official intercourse between the Cantons and foreign governments or their representatives, shall take place through the federal council,

as late as 1843. Constitutional practice shows therefore that the consent of Congress may be given subsequent to the making of the agreement. And compare post p. 20.

Statutes at Large, I, 184, 190; II, 18; V., 215.

31. Wilson, The State, § 543.

32. Burgess, Political Science, II, 168.

33. Marten's, *Nouveau Recueil Generale de Traites*, 2me Serie, Table Generale, 1900. See names of various German states and volumes cited.

Compare (ibid) agreements made by the Austrian Principality of Liechtenstein, with Switzerland as to reciprocal right of physicians living on the frontier to practice medicine in the territory of the other, (1886); and that between the same parties as to sanitary regulations in cholera epidemics, (1896).

34. Ibid IV, 430, 433.

nevertheless, the Cantons may correspond directly with the inferior officials and officers of a foreign state in regard to subjects enumerated in the preceding article." [35]

The centralizing process has been carried further in Switzerland than in Germany; for the constitution restricts the treaty-making power of the Cantons by express limitations and the right of legation has become a mere power of corresponding with subordinate foreign officials.

The reasons for these differences between the constitutions of Germany and Switzerland and that of the United States are of course historical. The thirteen original States, during the time that they lived under the Articles of Confederation, never made individually any treaties with foreign powers. In Germany and Switzerland the component states had for several centuries each enjoyed the right of making treaties and the right of legation. The adoption of more centralized forms of government naturally involved compromises in favor of state independence, and the results were those which have been described. The States of the American Union have no standing internationally. As to foreign powers they are mere departments. The sole point at which they can come into official relations with a foreign government is by means of a local and non-political agreement.

The writer does not wish to be understood as supporting the proposition that the states of the American union ought in practice to enter into agreements with foreign powers. Whenever possible the subject should be regulated through action by the general government. Nevertheless, it is the basic principle of federal government that the individual states enjoy an autonomy in matters merely local, not affecting the interests of the states as a whole. Is there not an autonomy in local external affairs, at least as to the States bordering on Canada or Mexico, just as there is a local autonomy in matters purely domestic? The constitutional provision, "agreement or compacts with foreign powers" plainly indicates its existence. Constitutional practice in Europe on this subject points to the field in which the members of a federal government may safely be permitted to regulate their external affairs. The provisions of the Swiss constitution limit these agreements to the administration of public property and to border and police intercourse. Here is a field, non-political in character, which, if restricted to agreements with immediate foreign

35. Swiss Constitution (Hart's Translation), Articles 8, 9, 10, 85, § 5.

neighbors, might, perhaps be left to the States. As has been said, the necessity of subsequent approval by Congress, remove the danger of confederatism.

Bluntschli classes as treaties those "concluded between the subordinate authorities or different administrative services of two or more states, as to matters relating to the exercise of their functions." Those which enter "partially" into this class, he adds, are those which "have for their object the regulation of frontiers, when this matter is left to provincial governments; judicial requisitions effectuated without the intervention of the supreme authority; reformations of river courses in the provinces; * * * treaties between neighboring communes of two different states, relative to questions of local and communal interest." Droit. Int. § 432, 2.

These are manifestly the agreements contemplated by articles 107 and 108 of the Constitution of Argentina, where it is provided that "the Provinces shall have the power to conclude, with the knowledge of the federal Congress, such *partial* treaties, as may be necessary for the purposes of administrative justice, or for regulating provincial interests, or undertaking public works, &c." But "they cannot, without authority from the federal Congress, enter into any partial treaties of a political character."

The agreements referred to, in Bluntschli's work and in the Argentine Constitution, as partial treaties, relate to matters of an administrative and judicial character, or are purely local in scope and application. They are confessedly treaties of a *quasi* sort. In the view of the present writer, they ought to be called "agreements" and thus differentiated from engagements between nations, which necessarily belong to the field of foreign policy or international law.

II.

AGREEMENTS MADE BY THE PRESIDENT.

International agreements entered into by the President, and which become binding, without the concurrence of the Senate, may be classified as follows: (1) Agreements authorized by act of Congress; (2) agreements entered into by virtue of the military powers of the President; (3) *Modi vivendi* and other provisional agreements; (4) agreements for the adjustment of claims of American citizens against foreign governments.

These arrangements may take the form of a single instrument signed by the accredited agents of both parties or may be evidenced by an exchange of diplomatic notes.

We naturally pass from the discussion of agreements, made by the States with the assent of Congress, to agreements made by the President with the same assent. They necessarily bear an analogy, one to the other. To the validity of agreements made by the States, congressional sanction is always necessary, because expressly required by the Constitution. To agreements made by the President, to whom the Constitution intrusts full diplomatic powers, the assent of Congress may or may not be necessary, as will appear from the following examination.

1. Agreements entered into by virtue of an act of Congress differ from ordinary treaty arrangements, in that they have the sanction of a majority of both houses of Congress, instead of the vote of two-thirds of the senators present in executive session. They are also usually entered into subsequent to the passing of the enabling act of Congress, whereas with treaties the negotiations, in theory at least, precede action by the Senate. It would seem, however, that a sub-

sequent enabling act of Congress would validate a presidential agreement, of the sort about to be considered, inasmuch as the Supreme Court has held that the consent of Congress to the agreements between the States may be given subsequent to the conclusion of the arrangement. [1]

The legal basis of agreements of this class is therefore congressional action; whereas the legal basis for treaties and for agreements of the last three classes, is to be found in the provisions of the Constitution itself.

The largest number of agreements coming under this head have related to the modification of tariff acts by means of reciprocity agreements. Thus, the act of October 1, 1890, having placed certain articles on the free list, charged the President with the duty of ascertaining whether the tariff laws of foreign countries, in view of the free admission of certain enumerated articles, imposed upon products coming from the United States, duties that were reciprocally unequal and unreasonable. Such being found to be the case, he was directed to suspend the free admission of the said enumerated articles, coming from the non-reciprocating country, and to impose, in lieu thereof, certain tariff rates specified in the act. [2]

Under the authority of this act, the President effected ten tariff arrangements with foreign countries, chiefly in the West Indies and Spanish America. [3] The arrangement was evidenced by the exchange of diplomatic notes and by the President's proclamation. [4]

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1. *Green v. Biddle,* 8 Wheat, 86; *Virginia v. Tennessee,* 148 U. S. 503.

An instance of an agreement of this character is the arrangement of Jan. 30, April 23, 1896, between Mr. Olney and Sir Julian Pauncefote, for removing the Cree Indians from Montana and delivering them at the international boundary to the Canadian authorities. This proceeding was sanctioned by the subsequent act of May 13, 1896, appropriating $5,000 to enable the President to carry it into effect. Sen. Rep. 821, 54 Cong. 1 sess. V. 4.

So also in the following case: Horse-shoe Reef, in Niagara River at the outlet of Lake Erie, was ceded to the United States under a protocol signed at London, Dec. 9, 1850, on condition that the United States erect a light house thereon and refrain from fortifying the reef. The agreement was approved by Congress, when by the act of Mar. 3, 1851, an appropriation was made for building the light house. Treaties and Conventions of U. S., p. 444. Statutes at Large, 9: 627.

2. R. S. Suppl. Vol. 1, p. 856.

3. Monthly Summary of Commerce and Finance, H. Doc. 15, pt. 3, 57, Cong. 1 sess. p. 944 ff.

4. As to Brazil, Foreign Relations of the U. S., 1891, p. 43-47.

The *modus vivendi* of January 10-11, 1905, with Spain, agreed upon favored nation treatment of the products of the United States, imported into Cuba and Porto Rico, and of the products of those islands imported into the

The tariff act of July 24, 1897, section 3, authorizes the President to enter into commercial agreements, stipulating for reciprocal tariff concessions with respect to certain enumerated articles, to suspend, during the time of such agreement, the rates of duty on the said articles, elsewhere provided in the act, and to direct that certain other rates, therein specified, shall be imposed in lieu thereof. [5] Under the authority of the above section, reciprocity agreements have been entered into with France, Germany, Italy and Portugal. [6]

The act of October 1, 1890, came before the Supreme Court in the case of *Field v Clark*, [7] in which its constitutionality was sustained, the court holding that the procedure, provided for in section 3, did not involve a delegation to the President of either legislative or treaty-making powers. In delivering the opinion of the court, Mr. Justice Harlan pointed out that in a period embracing almost the whole of our national existence, Congress had passed many acts of an analogous character, and that they amounted to a practical construction of the Constitution which was not lightly to be overruled. Such were the embargo act of June 4, 1794; the act of February 9, 1799, as to commercial intercourse with France; the act of December 19, 1806, to suspend the non-importation act of that year; the non-intercourse act of March 1, 1809, revived by the act of May 1, 1810; the acts of March 3, 1815, and May 30, 1830, as to the conditional non-imposition of tonnage and import duties; the act of March 6, 1866, as to the non-importation of neat cattle and hides. In all of these, their going into effect was left to the discretion of the President. Moreover the act of May 1, 1810, which empowered the President to revive commercial intercourse with France or Great Britain, if either of them revoked their edicts violating the neutral commerce of the United States, was upheld in the case of *The Brig Aurora*, 7

United States. It was stipulated that the *modus vivendi* should continue in force until the conclusion of a definite treaty between the parties, or until terminated by three months' notice. This arrangement appears to have been entered into in pursuance of the authority conferred upon the President, by Section 5 of the Act of August 30, 1890, to direct that the products of foreign states, discriminating against any product of the United States, might be excluded from importation into the United States.

For. Rel. 1894, p. 625; *Ibid*, 1895, p. 1186; Mess. and Papers of Presidents, Vol. 9, p. 637; R. S. Suppl. I, p. 796.

5. R. S. Suppl. II, p. 702.

6. H. Doc. 15, 57 Cong. 1 ses. pt. 3, p. 958 ff.

7. 143 U. S. 649.

Cranch 382, where it was contended that the act involved a transfer of legislative power to the President. These precedents showed, therefore, that "in the judgment of the legislative branch of the government, it is often desirable, if not essential for the protection of the interests of the people, against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."

As to the act of 1890 he said, "what the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

The same reasoning, he added, was applicable to the objection that the third section of the act invested the President with treaty-making powers.

The authority to make trade-mark agreements is found in Section 1, of the act of March 3, 1881, wherein it is provided, "That owners of trade-marks used in commerce with foreign nations, domiciled in the United States and located in any foreign country which by treaty, convention or law affords similar privileges to citizens of the United States, may obtain registration of such trade-marks by complying with the following requirements," etc. [8] Two trade-mark agreements, one with the Netherlands and the other with Switzerland were entered into in 1883, [9] neither of which was submitted to the Senate. Generally speaking, however, the subject of the protection of trade-marks abroad is regulated either by special conventions with different states, or through the medium of the international convention for the protection of industrial property, of March 20, 1883, adhered to by the President, under the advice of the Senate, in 1887. [10]

An exchange of notes between the American consul general in Morocco and the diplomatic or consular representative of the principal European powers in that country, has established there the reciprocal protection of trade-marks in favor of their respective citizens and sub-

8. R. S. Suppl. I, p. 322.

9. Sen. Doc. 20, 56 Cong. 2 sess. pp. 334 and 337.

10. Treaties in Force (1899), p. 684. For additional article, Dec. 14, 1900. Stat. at L. v. 32, pt. 2, 1936.

jects doing business in Morocco. Authority for this agreement would seem to be derived from the acts of Congress establishing the exterritorial judicial functions of consuls in Morocco, from the act of March 3, 1881, and the convention of March 20, 1883, above referred to." [11]

Reciprocal arrangements for dispensing with the admeasurement of vessels, for the purpose of estimating tonnages dues, were entered into with Sweden, in 1875, and with the Netherlands and Spain in 1878. [12] The governments of the several parties having adopted the so-called Moorsom system of admeasurement, it was agreed that thereafter their respective merchant vessels, entering the ports of the others should be taken to have the tonnage indicated in their respective certificates of registry. This procedure, which was incorporated in the customs regulations of the treasury department, was not authorized by law till the year 1882. [13]

In pursuance of acts of Congress, protocols defining more specifically the boundary line between the United States and Canada have been entered into with Great Britain. Thus, the northwest water boundary dispute was terminated by the award of the German Emperor in favor of the de Haro channel, and under authority of the act of February 14, 1873, the President was authorized to appoint the Secretary of State, a joint commissioner for the purpose of completing the marking of the line. Mr. Fish, Secretary of State, and Messrs. Thornton and Prevost, in behalf of Great Britain, on March 10, 1873, signed a protocol and maps accurately describing and indicating the water boundary line. A similar protocol dealing with the portion of the boundary between the Lake of the Woods and the Rocky Mountains, was, by virtue of the act of March 19, 1872, signed in London on May 29, 1876, by the American and English commissioners who had previously ascertained and marked the line. [14]

An agreement for the reciprocal right to aid vessels wrecked or disabled in the conterminous waters of the United States and Canada

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11. R. S. §§ 4127, 4083, 4086. E. g. Agreement with Great Britain, Dec. 6, 1899.

12. For. Rel. 1875, p. 1274; 1878, pp. 764, 774, 706-708.

13. R. S., Suppl. I, p. 379.

For an agreement on this subject entered into subsequent to act of Aug. 5, 1882, see that with Denmark of Feb. 26, 1886. Treaties and Conventions of U. S., p. 1186.

14. Stat. at Large 17, p. 437; Treaties and Conventions of the U. S., p. 495. Marten's *Nouveau Recueil,* (2 ser.) 4:504.

was effected as a result of the concurrent legislation of Congress and of the Dominion Parliament, and is the subject of the President's proclamation of July 17, 1893. It was preceded by an extended diplomatic correspondence, from which it appears that the principal obstacle to an agreement was the unwillingness of the Canadian government to include the Welland canal in the arrangement, as contemplated by the Act of Congress of May 24, 1890. The difficulty was removed by the Act of March 3, 1893, which amended the former act by striking out the words "the Welland Canal." [15]

Agreements which properly come under this head, although their making is only inferentially authorized by law, are two entered into with Spain and Greece, the former on January 12, 1877, the latter on February 10, 1890. That with Spain is styled "Protocol of Conference and Declarations Concerning Judicial Procedure," and was intended to exempt American citizens in Spanish possessions, from military trials for treason except where taken with arms in their hands. Reciprocally it was declared on the part of the United States that the provisions of the Constitution and laws of the United States already guaranteed the exemption to Spaniards, when in the United States.

The agreement with Greece is styled, "Protocol Explanatory of the Scope and Effect of Article I of the Treaty of December 10-20, 1837," between the parties. The article in question was the one usual in commercial treaties, granting reciprocally to the citizens and subjects of the contracting parties, the right to reside and carry on business in the territory of the other, under the protection of the laws. The point here involved was, whether or not corporations and joint stock companies come within the meaning of the word "citizen," and might therefore be reciprocally admitted to carry on business in the two countries. The Attorney General, Mr. Miller, having been consulted, gave an opinion that the word "subjects" as used in the treaty included corporations, on the analogy of the decision of the Supreme Court, holding that foreign corporations are, for the purpose of suing and being sued in the courts, "citizens" within the meaning of the Constitution. The American minister at Athens, was accordingly instructed, on September 19, 1899, by Mr. Adee, acting Secretary of State, that, such being the law, and in view of the precedent established in the protocol with Spain of January 12, 1877, "it was not thought necessary that a specific agreement to continue for a certain time, and to be

15. For. Rel. 1893, p. 344, and *Ibid*, 1892, 276-333 *passim*.

terminable upon a certain notice, should be entered into," but that "all that would be necessary would be to formulate a protocol" containing declarations that corporations of each country were to be regarded as citizens or subjects within the meaning of Article I of the treaty of 1837, and therefore might reciprocally exercise the rights and privileges therein stipulated in the territory of the other. [16]

Postal conventions, which prior to 1844 took the form of treaties and were submitted to the Senate, have since the act of June 8, 1872, authorizing the procedure, been negotiated and signed by the Postmaster General, by and with the advice and consent of the President. These are not submitted to the Senate. [17] Indeed, Section 210 of the revised statutes recognizes that there is a distinction between postal conventions and treaties. As Judge Simeon E. Baldwin has said: "There may be a bargain between independent States which is something less than a treaty and postal conventions are in the nature of commercial transactions without any direct political significance." [18]

The so-called Platt amendment to the act of March 2, 1901, contained a provision for the acquisition of naval and coaling stations in Cuba "at certain specified points to be agreed upon with the President of the United States." [19] The agreements of February 16 and July 2, 1903, for the lease of naval and coaling stations therefore became definitive without the concurrence of the Senate. The agreement of July 2, in addition to providing for an annual rental of two thousand dollars, contained stipulation as to matters of extradition.

The making of agreements by virtue of an act of Congress seems to show a tendency toward the practice which prevails in other States of the world. In no European Constitution is the approbation of treaties intrusted to one branch of the legislative body alone. A simple majority vote of both branches is the universal requirement. Moreover, the general rule is that only certain kinds of treaties, such as those relating to cessions of territory, to commerce, or those imposing finan-

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16. Treaties and conventions of the U. S., p. 1030, For. Rel. 1877, p. 493. *Ibid.* 1899, p. 481; *Ibid.* 1890, p. 510.

17. Crandall, Treaties, their Making and Enforcement, p. 92 (c). The last cited work is a succinct and valuable examination of the treaty making power. Mr. Crandall's connection with the State Department and his familiarity with its manuscript and other sources makes his work especially authoritative.

18. *Yale Review,* Vol. 9, p. 414.

19. R. S. Suppl. II, p. 1504.

cial obligations, need be submitted to the legislature. These are subjects which are regulated by legislation in all constitutional governments. There are, of course, other subjects which, if dealt with by treaty, must have legislative sanction; as in Germany, where the list includes treaties relating to industrial and literary property, citizenship, posts and telegraphs; as in Spain, where relating to the admission of foreign troops into the kingdom; as in the Netherlands, where relating to legal rights; as in France, where relating to the persons and property of French citizens in foreign countries. Generally speaking, as to other sorts of treaties, the executive may enter into binding engagements without legislative assent. This necessarily includes many treaties of a political character, such as the Triple Alliance (Italy, Austro-Hungary, and Germany); the treaty of Berlin of 1888 (France).

Portugal and Switzerland are the only European States in which legislative approbation is required for all treaties.[20]

In the United States, as we have seen, the participation of Congress has manifested itself chiefly in relation to regulations of commerce, and as to trade-marks, copyright[21] and postal relations. In all of these cases there has been a general law, in pursuance of which the President has made agreements. In all, except the case of postal conventions, the theory on which the President acts, is that he is merely putting into execution a law whose operation is contingent upon the existence of certain facts—reciprocal legislation or practice in a foreign State.

Thus under the tariff acts of 1890 and 1897, the question of what were "reciprocally unequal and unreasonable," or "reciprocal and equivalent" tariff concessions, offered by foreign countries, was one to be decided by the President. The discretionary power conferred necessarily had considerable scope and importance. Whether those rates were reciprocally reasonable or equivalent is just such a question as would have to be determined in the negotiation of any reciprocity treaty; and the President's determination as to their reasonableness or equivalence would be final. It is difficult to perceive how the transaction differs to this extent from any reciprocity treaty. On the whole it seems necessary to conclude that there are certain ends, which, under our Constitution, may be attained in two different ways. It is true as to annexations of territory, which have been made both by treaty and

20. Crandall, op. cit. 178 ff.

21. Act of March 3, 1891, Sec. 13 and note. R. S. Suppl. I, 954.

by act of Congress.[22] The Constitution gives Congress power to make laws respecting foreign commerce and revenue. It follows that as a necessary incident thereof, it may also empower the President to effect their execution by means of agreements relating to those subjects.

2. The military power is conferred on the President by that clause of the Constitution which declares that he "shall be Commander-in-Chief of the army and navy of the United States and of the militia of the several States, when called into the service of the United States."[23] The power to direct belligerent operations necessarily involves the right to suspend them under an agreement, which may embody terms of peace, to be settled in a future formal treaty. Such, of course, are the so-called "preliminaries of peace" which have usually preceded the actual closing of the great wars of modern history. The most familiar example in recent years is the peace protocol signed

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22. Louisiana in 1803; Texas in 1845, and Hawaii in 1898.

The annexations of Texas and the Hawaiian Islands were accomplished by reciprocal legislation in the two countries. The joint resolution of March 1, 1845, provided an alternative method of effecting the annexation of Texas. Either the President might submit to the Republic of Texas, as an overture, the text of the resolution, which provided that Congress consented to the admission of Texas as a State, or he might resort to negotiations with the Republic through the medium of a mission "to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two houses of Congress, as the President may direct."

In the case of Hawaii the joint resolution of July 7, 1898, provided that,

"WHEREAS, The Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede absolutely and without reserve to the United States all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies . . . . . .

"*Resolved,* That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands are hereby annexed, as a part of the territory of the United States, and are subject to the sovereign dominion thereof."

The Hawaiian Constitution of 1894 gave the President of that country power to make a treaty of annexation with the United States, and the Hawaiian Legislature in 1896 had passed a joint resolution in favor of annexation. When the annexation treaty, entered into by Mr. Sherman, Secretary of State, and the Hawaiian commissioners, on June 16, 1897, seemed likely not to receive the assent of the Senate, the text of the treaty, with such verbal changes as were necessary, from the different character of the two documents, was incorporated in the joint resolution of July 7.

Stat. at Large, 5:797; 9:108. S. Rep. 681, 55 Cong., 2 sess., p. 96.

23. Art. II § 2.

August 12, 1898, which brought actual hostilities to a close in our late war with Spain. It is described in its title as "embodying the terms of a basis for the establishment of peace between the two countries." It, settled, practically, however, the fate of Cuba and Porto Rico, leaving only the title to the Philippines to be agreed upon at the future negotiations of a treaty of peace. Nevertheless, the preliminary character of the arrangement and its relation to the war power, made its submission to the Senate unnecessary. [24]

The President's control of the army and navy of the United States exists in time of peace as well as in war. It includes necessarily the disposition of these forces in whatsoever localities the President may select. [25] Therefore, when the Rush-Bagot agreement, by an exchange of notes on April 28 and 29, 1817, limited the naval forces of the United States and Great Britain on the great lakes to a certain number of vessels, the President was merely exercising his power as Commander in Chief of the navy. Four days later (May 2) orders were issued by the Secretary of the Navy, on the direction of the President, to make the reduction to the number of naval vessels, required by the terms of the agreement. Nearly a year afterwards (April 6, 1818) the President submitted the agreement to the Senate, with the question as to whether it was "such an agreement as the Executive is competent to enter into

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24. The protocol is commented on by a writer in the *Review Générale de Droit International Public* (6:578) as follows:

"Instead of concluding a definite treaty, the parties contented themselves with a simple protocol, for which the assent of the legislative bodies was not necessary on either side. This protocol being declared provisionally executory, the United States obtained the same advantages that it would have derived from a definite treaty, viz: the evacuation of Cuba, Porto Rico, &c., while the rights of the legislative bodies remained nevertheless in theory reserved."

In the following September, and before the meeting of the Peace Conference in Paris, the Spanish Cortes gave its sanction to the negotiation of a peace on the basis of the protocol, and thus approved its terms. *(Ibid,* p. 580).

A *modus vivendi* was entered into August 17, September 6, 1898, by Mr. Moore, acting Secretary of State, and Mr. Cambon, French Ambassador, representing Spain, in reference to the postal service and the importation of supplies in Spanish vessels into Cuba, Porto Rico and the Phillipines, pending the adoption of a treaty of peace.

For. Rel. 1898, pp. 801, 802, 811.

25. Burgess, Political Science, II, 260.

For a narrower view of the President's powers as commander-in-chief, see David Dudley Field, Speeches, Arguments, etc., II:165.

by the powers vested in it by the Constitution, or is such a one as requires the advice and consent of the Senate, and in the latter case for its advice and consent, should it be approved." Having been approved by the Senate, it was formally proclaimed by the President on April 28, 1818.[26] According to Mr. Foster, Secretary of State, writing in 1892, public official documents do not show why the agreement was submitted to the Senate.[27] All that we know is that on January 14, 1818, Mr. Bagot asked John Quincy Adams, then Secretary of State, whether the correspondence on the subject, which he said was a sort of treaty, would be communicated to the Senate. On the matter being called to the attention of President Monroe, he said he did not think it necessary to do so. Subsequently (April 30) Bagot, in conversation with Adams, adverted to the fact of the arrangement being proclaimed.[28] It is possible that Monroe decided to add the Senate as a party to the agreement, and thus remove any doubts that there might be in the mind of the British government as to its binding character.

Pending the settlement of the dispute with Great Britain over the northwest water boundary, in which the United States asserted that the line passed through the de Haro Channel, the island of San Juan, lying south and east of the latter, was jointly occupied from 1860 to 1873 by the military forces of the United States and Great Britain. This arrangement was effected on the part of the United States by General Winfield Scott. Under instructions from President Buchanan, he made a proposition on October 25, 1859, to Governor Douglas, of Vancouver Island, for a joint military occupation. Although the proposition was declined by Governor Douglas, it was subsequently acceded to, when, on March 20, 1860, Rear Admiral Baynes, commanding the British naval forces in the Pacific, announced to Captain Hunt, commanding the United States troops on the island that a detachment of royal marines, equal in number to the troops of the United States, would be landed on the island "for the purpose of establishing a joint military occupation agreeably to the proposition of Lieutenant-General Scott." The arrangement was formally recognized as binding in notes exchanged between the State Department and the British Legation at Washington, June 6-8, August 17-18, 1860. The occupation, however, gave rise to conflicts between the military and civil authorities of the

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26. American State Papers, Foreign Relations, IV; 202-207.
27. H. Ex. Doc. 471, 56 Congress, 1st sess., p. 14.
28. Memoirs of John Quincy Adams, IV; 41, 84.

United States. The local territorial officials, asserting that the agreement was without sanction of law, claimed the right to collect taxes and execute judicial process. But as this would have been subversive of the original intention of the agreement, the American military officers, under directions of the War Department, forcibly resisted attempts of civil authority to exercise jurisdiction. The arrangement continued till the latter part of 1873, when the island was evacuated by the British forces, in consequence of the arbitral award of the German Emperor, declaring that the boundary line should be drawn through the de Haro channel. [29]

A source of irritation, which had existed for many years on the Mexican border, arose from depredations and raids made by Indians living on one side of the line, within the territory on the other side. Efforts to put a stop to the practice were nullified by lack of authority in the military commanders of forces, stationed on the frontier, to continue pursuit of the Indians beyond the international boundary. Moreover, the Mexican Constitution forbade the entrance of foreign troops upon the territory of Mexico without the consent of the Mexican Senate. That body at length gave its assent for the purpose above referred to. Accordingly an arrangement for the reciprocal crossing of the frontier, by the troops of the United States and Mexico in pursuit of marauding Indians, was effected by an exchange of notes, on May 12 and June 6, 1882, between Mr. Frelinghuysen, Secretary of State, and Mr. Romero, the Mexican Minister. More formal agreements to the same effect were signed on June 25, 1890, on November 25, 1892, and on June 4, 1896. The first two were to have a duration of one year; the last one was to "remain in force until Kid's band of hostile Indians shall be wholly exterminated or rendered obedient to one of the two governments. [30]

3. A *modus vivendi* is defined by Mr. Edward J. Phelps, in the "Standard Dictionary" as "a temporary arrangement between two sovereigns for the conduct of certain affairs pending negotiations for a

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29. Sen. Ex. Doc. 29, 40 Cong. 2 sess. pp. 161, 192, 196, 209, 256, 258, 262, 263, 269; Papers Relating to Treaty of Washington, V. p. 270; Treaties and Conventions of the U. S., p. 494.

30. Foreign Relations, United States, 1881, p. 750; *Ibid,* 1882, pp. 426, 419, 421.

Agreements have been made with Great Britain on several occasions for the passage of troops through the United States. It is to be noted in contrast that the constitutions of Mexico and Spain require legislative assent before such permission can be granted.

Wharton Int. Law Digest, § 13. See also For. Rel., 1898, p. 358.

treaty on the same subject." The pendency of negotiations on a particular subject and the necessity of establishing a temporary regulation of the same, until ultimately adjusted by treaty, are the characteristics of this form of agreement.

Probably the most important *modus vivendi* in our diplomatic history was that of October 20, 1899, as to the Alaskan boundary. It established a line recognized by the American and British governments for four years, until the final adjustment by the recent arbitral tribunal.

The *modus vivendi* with Great Britain of June 15, 1891, was agreed upon in the course of the negotiations which preceded the signing of the convention of February 29, 1892, referring to arbitration, the question of the right of the United States to prevent fur-sealing in Bering Sea. By the terms of this *modus vivendi,* the parties agreed in substance, to prohibit to their respective citizens and subjects until the following May, the killing of seal in that part of Bering Sea lying east of the line of demarcation described in Article I of the treaty of 1867, ceding Alaska to the United States. Subsequently the same agreement was embodied in a convention, signed April 18, 1892, to hold good during the pendency of the arbitration proceedings. This last arrangement was necessarily submitted to the Senate for its approval, since it contained an additional stipulation that, in case the arbitral decision should be against the United States, the latter would make compensation to British subjects, for abstaining from fur sealing during the pendency of the arbitration. [30a]

The fisheries articles of the treaty of Washington of May 8, 1871, being about to terminate on July 1, 1885, a "temporary diplomatic agreement," [31] was entered into by exchange of notes (April-June 1885) between Mr. Bayard, Secretary of State, and Mr. West, the British Minister, by which the fishing privileges, which would otherwise have come to an end on July 1st, were extended in favor of the citizens and subjects of the two countries, until the end of the fishing season. The object of the agreement was to avoid difficulties and misunderstandings which might arise in consequence of the premature termination of the fishing of that year. [32]

A "temporary arrangement" was entered into at the time of the framing of the fisheries treaty with Great Britain in 1888. This agreement, intended to go into operation while the legislative bodies of the

30a. For. Rel. 1891, 552-570; 27, Stat. at large, 952.
31. Also referred to by Mr. Bayard as a *modus vivendi.* For. Rel. 1885, p. 465.
32. For. Rel. 1885, p. 460 ff.

two countries had the treaty under consideration, extended for two years, to American fishing vessels, the right to enter Canadian and New Foundland harbors for bait and other supplies, upon payment of an annual license tax. The text of this arrangement was sent to the Senate with the treaty itself. [33]

The two *modi vivendi* with Spain of January 10-11, 1895, and August-September of 1898, the former referring to favored nation treatment of imports into the Spanish West Indies and the United States; the latter, relating to the postal service and importation of supplies into Spain's former insular possessions, have been noticed in the preceding pages. [34] They were, however, examples of this form of agreement, since they were temporary in character and contemplated the adoption of similar provisions in a formal treaty.

A *modus vivendi* regulates, at present writing, the status of the foreign claims against Santo Domingo. At the request of the Dominican government, and by direction of the President of the United States, the Secretary of War (possibly acting as Secretary of State in the absence of Mr. Hay) appointed certain persons to act as collectors of customs in the ports of Santo Domingo. Of the monies collected, forty-five per cent. are to be paid to the Dominican government and sixty-five per cent. deposited in a New York bank in trust for the claimants. The arrangement will be in force pending action by the Senate on the claims protocol of February 17, 1905, with Santo Domingo. In the event of adverse action by the Senate, the money is to be returned to the Dominican government. [35]

Further precedent for this arrangement, if any is needed, will be found in the numerous instances in which American ministers and officers have, at the solicitation of foreign governments, acted as arbitrators in disputes between them. [36] Thus in 1896, at the request of Costa Rico and Nicaragua, President Cleveland appointed a United States engineer to decide as to any point of disagreement between their respective commissioners then about to mark the boundary between the two countries. [37] Similarly, the President has on several occasions acted as arbitrator in disputes between foreign states. The most recent

33. Sen. Ex. Doc. 113, 50 Cong. 1 sess. p. 125. For the *modus* between Maine and New Brunswick, see *ante* p. 10.

34. *Ante,* notes, 4 and 24.

35. Associated Press Dispatches, March 28, 1905.

36. For. Rel. 1874, p. 70; 1875, pp. 188, 417, 749; 1878, p. 263; 1880, p. 391; 1898, p. 2.

37. For. Rel. 1896, p. 102.

example was the arbitration between Italy and Columbia as to the Cerruti claim against the latter government. [38]

4. One of the principal duties of the Department of State relates to the protection of American citizens abroad. If the citizen receives an injury to person or property in a foreign country and the local tribunals or other authorities unjustly deny him redress, the department will as a rule present his claim to the delinquent government. If reparation takes the form, as it usually does, of a payment of money damages, the State Department, acting in behalf of the claimant, receives the money in trust for the latter. [39] It may happen, however, that the foreign government is unwilling or unable to pay the claim immediately. In that case the representatives of the two governments may enter into an agreement setting forth the amount due and the date and terms of payment. This is, of course, a mere written acknowledgement of an existing indebtedness. Such were the agreements of May 1, 1852, with Venezuela, [40] May 24, 1897, with Chili, and February 27, 1875, with Spain. [41] They were not submitted to the Senate for approval, nor would there be any reason for doing so. It often happens, however, that the foreign government disputes the facts or the law involved in the claim, and recourse may be had to arbitration to effect a settlement. The arbitral undertaking, styled a "protocol of agreement," usually names an arbitrator or provides a method for choosing one or more, as the case may be; stipulates as to matters of procedure, such as the submission of evidence and briefs of counsel; fixes a time limit within which the award is to be made, and provides that the award shall be final and conclusive. In certain cases the amount due, in the event of an award in favor of the claimant, is agreed upon in advance.

As was said by Mr. Cass, Secretary of State, in 1859: "It is not necessary to submit to the Senate, for its formal approval, conventions

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38. For. Rel. 1878, p. 18; 1887, p. 268; 1892, pp. 1, 2, 17, 18; 1895, p. 960. Similar examples are the appointment of an American (E. Peshine Smith) as legal advisor to Japan, named at the request of Japan by the State Department (1871), and of American military instructors to Korea (1888).

For. Rel. 1871, p. 595; 1888, p. 437; Appleton's Cyclopedia of Biography, V:562.

39. 29 Statutes at Large, 28.

40. Butler, Treaty-making Power, II, 519.

41. Foreign Relations U. S., 1900, p. 68; *Ibid*, 1875, p. 1250. This last provided for indemnity in the "Virginias" case. An earlier protocol of Nov. 29, 1873, stipulated as to the release of the vessel, salute of the flag, and trial and punishment of delinquent officials in Cuba. For. Rel. 1874, p. 987.

providing for the adjustment of private claims, unless such a course is indicated in the convention itself." [42] If the claimant is satisfied with the terms of the arrangement, third persons will have no particular interest in the transaction. Where arbitration is resorted to it is only another instrument in the hands of diplomacy for effecting a settlement.

Prior to 1870, these arbitral conventions were generally submitted to the Senate for approval. The reason for this seems to have been that they were either general in character, adjusting an accumulation of claims of many years' standing, or that the arbitral agreement represented only one of a number of matters adjusted by a particular treaty, which would necessarily require the constitutional assent of the Senate. So far as known, no agreement referring to arbitration claims of foreigners against the United States has ever been entered into without the advice and consent of the Senate. [43]

The following is a list of arbitration agreements which have been entered into by the President since 1870, and which were not referred to the Senate:

Foreign State	Date	Character of Claims
Brazil	14 March, 1870	Ship "Canada," wrecked through the unlawful interference of Brazilian authorities.
Columbia	17 Aug., 1874	Seisure and detention of S. S. "Montijo."
Guatemala	23 Feb., 1900	R. M. May, Contract with Guatemalan government.
Hayti	28 May, 1884	Unlawful arrest and imprisonment of A. Pelletier. Contract of A. H. Lazare with Haytian government.
"	20 March, 1885	Extending time limit for decision of arbitrator in above agreement.
"	24 May, 1888	Unlawful imprisonment of C. A. Van Bokkelen.
"	18 Oct., 1899	Seizure and sale of property of Metzger & Co. for non-payment of taxes, also for contract claims against Haytian government.
Mexico	2 March, 1897	Injuries done to Oberlander and Messenger by Mexican citizens.

42. Wheaton's Int. Law. (Lawrence) p. 456, note 154.

43. Prof. John Bassett Moore, writing in the *Political Science Quarterly* (Sept., 1905, p. 414) on "Treaties and Executive Agreements," gives a comprehensive list, from which it appears that of the total number of private claims submitted to arbitration since 1794, twenty-seven have been held under agreements against nineteen under treaties.

Mexico	22 May, 1902	The unpaid installments of interest due on the so-called Pious Fund of the Californias. Referred to Hague Tribunal.
Portugal	13 June, 1891	Recission of contract of Lorenco Marques Railroad.
Nicaragua	24 March, 1900	Seizures of property of Orr & Laubenheimer *et al,* by Nicaraguan authorities.
Peru	17 May, 1898	Imprisonment and maltreatment of V. H. McCord by Peruvian authorities.
Spain	12 Feb., 1871	Injuries to person and property received by American citizens from Spanish authorities in Island of Cuba.
"	23 Feb., 1881	To terminate claims commission sitting under above agreement.
"	14 Dec., 1882	Extending time of above.
"	2 June, 1883	Extending time of above.
Russia	26 Aug., 1900	Seizures of Russian cruisers of schooners, James Hamilton Lewis, *et al,* for illegal sealing.
Salvador	19 Dec., 1901	Claims of Salvador Commercial Co. for certain acts and grievances suffered.
Venezuela	17 Feb., 1903	"All claims owned by citizens of the United States against Venezuela which have not been settled by diplomatic agreement or by arbitration."
Dominican Rep.	31 Jan., 1903	Claims of San Domingo Improvement Co., *et al,* for relinquishment of certain railroad and other properties; also for bonds of Republic owed by claimants.[41]

An important international engagement, entered into by the President alone, and which, on account of its adjustment of claims of American citizens may be put under this head, was the final protocol signed by the allies at Pekin, September 7, 1901, after the termination of the Boxer uprising. It contained provisions for the payment of indemnity to American citizens (as well as to the subjects of other powers); it created an international commission to receive and distribute the indemnity; and assigned, as security for payment, the revenues of the Chinese maritime and other customs. It also contained provisions of a political character, such as the punishment of Chinese officials involved in the Boxer affair, the razing of the Taku forts, the prohibition of the importation of arms and ammunition for two years,

44. Moore, International Arbitrations, pp. V. 4687, 4698, 4768, 4770, 4795, 4802-08. Foreign Relations of U. S. 1900, Appx. I 3; *Ibid,* 1903, p. 804. *Congressional Record* Feb. 13, 1905. Crandall, op. cit. p. 86. Butler, op. cit. pp. 459, 461, 487, 494 501.

a definition of the limits of the legation quarter, a reform in the Chinese Ministry of Foreign Affairs, the improvement of navigation of certain Chinese rivers, etc., etc.

Although stipulating a date for the withdrawal of the military forces of the allies from Pekin, and therefore partaking of the character of a peace protocol, it cannot be so regarded, because war, in the legal sense, had not existed between the allies and China. As has been pointed out, a peace protocol does not require the assent of the Senate, being an exercise of the war power intrusted to the President. But the agreement is preliminary and contemplates a subsequent embodiment of its terms in a formal treaty. The Protocol of September 7, 1901, was to all intents and purposes a definite arrangement.

This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character. As has been pointed out above, purely political treaties, are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Pekin, the jealousies between the allies, and the shifting and evasive tactics of the Chinese government, would have made impossible anything but an agreement on the spot.

III.

THE LATE ARBITRATION TREATIES AND "AGREEMENTS."

A discussion of "agreements" will not be complete without a brief consideration of the question raised in connection with the recent arbitration treaties which were approved by the Senate, with an amendment which substituted the word "treaty" for "agreement" in article II of the treaties. The article in question reads as follows:

"In each individual case, the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special [agreement]treaty, defining clearly the matter in dispute, the scope of the powers of the arbitrators, etc."

First as to the reasons for the use of the words "special agreement" in the above article. Those who have followed the subject will remember that the attempt at the Hague Conference in 1899, to make arbitration obligatory failed of adoption, although article 19 left the way open to the contracting parties to enter into treaties providing for obligatory arbitration. The first step in this direction was the arbitration treaty between France and Great Britain of October 14, 1903, adopted chiefly through the exertions of Sir Thomas Barclay, president of the British Chamber of Commerce in Paris, and M d'Estournelles, president of the parliamentary and arbitration group of the French Chamber of Deputies. This treaty became the model and its counterpart was concluded in identical terms between some six or more European governments. The same procedure was followed in respect to the identic treaties made by the United States with ten foreign States, beginning with France, November 1, 1904. In view of the fact that the whole list of treaties was supplementary to the Hague Convention, it was desirable that they should be, as far as possible, identical in language. Looking at the French text of the Anglo-French treaty of October 14, 1903, we find that Article 2 reads as follows: "Dans chaque cas particulier, lés Hautes Parties Contractantes, avant de s'adresser à la Cour permanente d'arbitrage, signeront *un compromis spécial,* determinant l'object du litige, l'éntendue des pouvoirs des arbitres, &c., &c." [1]

1. *Revue Générale de Droit International,* 10: 800.

The word "compromis" was used for two reasons. It has come to have the special meaning of an agreement submitting a controversy to arbitration.[2] Moreover it is the word used in Article 31 of the Hague Convention itself which provides that: "The Powers who have recourse to arbitration sign a special act ("Compromis") in which the subject of the difference is clearly defined, as well as the extent of the arbitrator's powers."

In preparing the text of the several American treaties of arbitration, the nearest English equivalent to the word "compromis" was used; namely, "agreement." Indeed this is the word employed in the English text of the identic arbitration treaty between Great Britain and Spain of February 27, 1904.[3]

The principal argument which was urged in support of the substitution of "treaty" for "agreement" in the treaties, was that the Senate could not delegate to the President its treaty-making power. Had the treaties been accepted by the various foreign governments with the above change, then every arbitral arrangement entered into in pursuance thereof, would require the Senate's approval.

The arbitration treaties provided for the submission to arbitration of "differences of a legal nature or relating to the interpretation of treaties between the contracting parties." Although the general opinion was that the possible subjects of arbitration were few and simple, the Senate must have thought otherwise. If in a future treaty of arbitration, the general words of description ("differences of a legal nature or relating to the interpretation of treaties") were replaced by a specific enumeration of cases in which arbitration would be resorted to, it is believed, that the objection of an unconstitutional delegation of power to the President (if any existed) would be removed. A list of such cases will be found in Article 10 of the project submitted by the Russian government to the Hague Conference. This list is incorporated with some changes in the arbitration treaty between Mexico and Spain of January 11, 1902. The Russian list includes: claims of citizens or subjects against foreign governments; the interpretation and applica-

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2. *"Projet de règlement pour la procédure arbitrale internationale preparé par l'Institut de droit internationale—à la Haye,* 1875." Arts. 1 and 2. *Ibid. Session de Bruxelles,* 1895, sec. 2.

This use of the word is, in fact, much earlier. See, Grotius, *De jure belli ac pacis,* lib. III. c. 20 §46.

Treaty of Ryswick, Oct. 30, 1697 (France and the Empire) Article 7, referring a case to arbitration.

Compare Art. 1006 of the French Civil Code providing,

"Le compromis designera les objets du litige et les noms des arbitres."

3. *La Justice International, 2me Année* No. 10, p. 122.

tion of treaties on the following subjects—posts, telegraphs, railroads, sub-marine cables, collisions at sea, navigation of rivers, industrial and literary property (patents, trade-marks and copyrights), weights and measures, sanitation, inheritance, extradition, and those giving rise to purely technical questions of boundary. [4]

The alleged unconstitutional delegation of power to the President might equally be brought against extradition treaties, which specify a list of offenses for which extradition will be granted. As was said in *Holmes v. Jennison,* referred to above, each act of surrender under an extradition treaty, involves an agreement.

The treaty of March 1, 1889, with Mexico, which created the International Boundary Commission, is a pertinent example of the exercise of this power. [5] This treaty referred to the final decision of the Commission all differences and questions which might arise with respect to that portion of the frontier, where the Rio Grande and the Colorado form the international boundary, and more particularly with respect to the application of the provisions of the treaty of November 12, 1884, which established certain rules for the determination of the location of the boundary in the event of changes in the courses of the two rivers. [6] This treaty would certainly be open to the same objection which could be urged to a general treaty of arbitration of the kind proposed.

Article 23 of the Universal Postal Convention of July 4, 1891, to which the United States is a party, provides that:

1. "In case of disagreement between two or more members of the Union as to the interpretation of the present convention, or as to the responsibility of an Administration, in the case of loss of a registered article, the question in dispute is decided by arbitration. To this end each of the administrations

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4. Holls, Peace Conference at the Hague, p. 227.

Since the above was written it has come to the notice of the writer that Russia and Denmark have signed on March 1, 1905, an arbitration treaty of this kind. The list of subjects to be referred to obligatory arbitration is somewhat more restricted than that contained in the Russian project submitted to the Hague Conference. The Russo-Danish Treaty makes arbitration obligatory in the following cases: (*a*) interpretation or application of conventions relating to private international law, the regime of commercial and industrial associations, matters of procedure, whether civil or penal, or extradition; (*b*) pecuniary claims where the obligation to pay an indemnity or any other kind of payment is recognized in principle by the two parties. *Law Mag. and Rev.,* Aug., 1905, p. 468.

5. By the Convention of Nov 21, 1900, the duration of the treaty of March 1, 1899, was extended indefinitely.

6. Treaties in Force (1889) 415.

concerned chooses another member of the Union not directly interested in the matter."

"2. The decision of the arbitrator is given by an absolute majority of votes.

"3. In case the votes are equally divided the arbitrators choose, in order to settle the difference, another administration equally disinterested in the dispute in question."

Here we have strong precedent for conferring upon the executive department power to refer to arbitration differences as to the interpretation of a convention of a special sort. The choice of the arbitrator is evidently to be made by the Postmaster General. [7]

From the foregoing facts and precedents we may derive the following conclusions:

That an "agreement" with a foreign power, whether made by a State, with the consent of Congress, or by the President with or without that consent, is not a contract, included under the term "treaty," as used in the Federal Constitution.

That an "agreement," if so made by a State, comes within this category, if it relates to local or temporary matters, or to property rights rather than to political objects.

That the President, under an act or resolution of Congress, and by virtue of his duty to see that the laws are faithfully executed, may make agreements to carry such legislation into effect.

That the President alone may enter into an "agreement," where it (a) involves an exercise of the military power (b) regulates temporarily a matter to be ultimately adjusted by formal treaty (c) relates to private claims against foreign governments.

That the President, by virtue of a general arbitration treaty, specifically enumerating certain classes of cases, to be referred to arbitration, may lawfully make the agreements necessary for that purpose, without submitting the same to the Senate for its approval.

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7. Statutes at large, Vol. 28, p. 1093.

Judge Simeon E. Baldwin in the *Yale Review*. Vol. 9, p. 410.

In the treaty of commerce between the United States and the Independent State of the Congo, of January 24, 1891, article 13, provision is made for reference to arbitration of differences with respect to the "validity, interpretation, application or enforcement" of any of the provisions of the treaty.

Arbitration is also provided for in articles 54 and 55 of the African Slave Trade Treaty, of July 2, 1890, to which the United States is a party. In case an indemnity is claimed by a vessel, captured for slave-trading, the amount is to be ascertained by arbitration.

Treaties in Force (1899) pp. 365, 722.